

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

DEC -4 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

CEDRICK DWAYNE JONES,

Appellant.

2 CA-CR 2007-0381

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20064621

Honorable Frank Dawley, Judge Pro Tempore
Honorable Edgar Acuña, Judge

AFFIRMED

David Alan Darby

Tucson
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 A jury found Cedrick Jones guilty of unlawful possession of a narcotic drug. After determining Jones had one historical prior felony conviction and had committed the current offense while on parole, the trial court sentenced him to an enhanced, presumptive

term of 4.5 years' imprisonment. Jones appealed, and counsel filed a brief citing *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 537, 2 P.3d 89, 96 (App. 1999), in which he asks this court to review the record for fundamental error. He identifies as "colorable issues" whether the court abused its discretion in denying Jones's motion for new counsel, in reversing its order that the state reinstate a plea offer as a sanction for a discovery violation, and in denying Jones's motion to suppress evidence. Jones raises these same issues in a supplemental brief he has filed pro se.¹ We affirm.

Request for New Counsel

¶2 Jones first argues that the trial court "err[ed]" in denying his pretrial request for new counsel. We will not disturb the court's decision "absent a clear abuse of discretion." *State v. LaGrand*, 152 Ariz. 483, 487, 733 P.2d 1066, 1070 (1987). In this case, Jones's first trial counsel filed a motion to withdraw, in which he cited, without elaboration, "irreconcilable differences." At the hearing on the motion, counsel was out of the country, and another attorney appeared in his stead. That attorney stated he did not know "all of the details" underlying the motion but that there had apparently been a "breakdown in the relationship" between Jones and counsel; the public defender's office had explored the possibility of assigning the case to a different attorney, but Jones was

¹Jones also argues his trial counsel was ineffective in failing to adequately explain the state's plea offer to him and that appellate counsel was ineffective in filing an *Anders* brief; however, because ineffective assistance of counsel claims may not be raised on direct appeal, we do not address these contentions. See *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002).

“fairly adamant he [did] not want the Public Defender’s Office” representing him. He also noted that an attorney who had previously represented Jones happened to be “next on the list” for appointment. When questioned directly by the court, Jones did not cite any disagreements with his current counsel but voiced his general dissatisfaction with counsel’s conduct, specifically counsel’s statements to him about the likely outcome of trial and sentencing.² The court denied the motion to withdraw, and the public defender apparently assigned a different attorney to Jones’s case.

¶3 That lawyer filed a “motion to determine counsel, due to possible conflict.” At a hearing on that motion, Jones expressed concern about his counsel’s language skills, asserting: “I feel like [counsel] don’t have a clear grasp on the English language pretty much,” but stating he was not concerned with her effort or her legal ability. The court noted counsel had “an accent that may be easier or harder for some people to understand” but determined that “her effort and her ability as an attorney” were not affected and that no “legal conflict” or other basis existed requiring appointment of new counsel.

¶4 Although it is unclear whether, on appeal, Jones is challenging the trial court’s ruling on both of these motions, we find no abuse of discretion in its ruling on either one. “A defendant is constitutionally entitled to representation by counsel or to proceed without

²In his supplemental brief on appeal, Jones contends that counsel incorrectly explained the terms of a probation-available plea offer to him, causing him to reject the offer. Counsel’s motion to withdraw, however, cited only “irreconcilable differences.” And, although Jones said at the hearing that his counsel had told him “in effect . . . I couldn’t get probation because of my prior,” he did not clearly question counsel’s competence below.

counsel if he so chooses. However, a defendant is not entitled to any *particular* counsel, only to competent counsel.” *LeGrand*, 152 Ariz. at 486, 733 P.2d at 1069 (citations omitted). Jones failed to clearly allege, let alone show, that either counsel was not providing competent representation. Nor did he show irreconcilable differences with either attorney. *See State v. Cromwell*, 211 Ariz. 181, ¶ 37, 119 P.3d 448, 455 (2005) (describing level of “acrimony and depth of conflict” necessary to require substitution of counsel).

Discovery Sanction

¶5 Jones filed a “motion to dismiss or to preclude evidence or in the alternative motion to reinstate plea offer” based on the state’s failure to disclose, before the expiration of the plea offer, the “laboratory report regarding the composition of the alleged drugs.” The trial court originally granted the motion as a discovery sanction, precluding “laboratory results of any scientific testing of the alleged narcotic” if the state declined to reinstate the plea offer. Upon reconsideration, however, it denied the motion.

¶6 In its motion for reconsideration, the state explained it had set a deadline of February 5, 2007—later extended to February 20—for acceptance of its plea offer and had requested that “any issues with disclosure be addressed promptly.” In December 2006, it disclosed the “positive results of a Narco Pouch test,” but laboratory testing was not completed until after the plea deadline. And, although defense counsel had requested disclosure of “various items” before the plea deadline, counsel had not inquired about or requested disclosure of the laboratory test results until May 2007. In his response to the

motion for reconsideration, Jones did not contest the state's assertions, and defense counsel conceded he had made no request for laboratory results prior to the plea deadline. He argued, however, that "[f]ailure to request the laboratory results d[id] not indicate that the Defense did not need the results when determining whether to enter into a plea agreement." The trial court disagreed and found Jones's "rejection of the plea . . . was not the result of the prosecutor's failure to provide additional disclosure which would impact his decision to accept or reject the extended plea [offer]."

¶7 Rule 15.8, Ariz. R. Crim. P., provides:

If the prosecution has imposed a plea deadline in a case in which an indictment or information has been filed in Superior Court, but does not provide the defense with material disclosure listed in Rule 15.1(b) at least 30 days prior to the plea deadline, the court, upon motion of the defendant, shall consider the impact of the failure to provide such disclosure on the defendant's decision to accept or reject a plea offer. If the court determines that the prosecutor's failure to provide such disclosure materially impacted the defendant's decision and the prosecutor declines to reinstate the lapsed plea offer, the presumptive minimum sanction shall be preclusion from admission at trial of any evidence not disclosed at least 30 days prior to the deadline.

Given the above uncontested facts, we find no abuse of discretion in the trial court's determination on reconsideration that Jones had simply "changed his mind" about accepting the offered plea and was attempting to "us[e] Rule 15.8 . . . as a means of forcing the State to re-extend [its] previously withdrawn plea offer."

Motion to Suppress

¶8 Jones contends the trial court erred in denying his motion to suppress evidence of the drugs that formed the basis of the charge against him. “In reviewing a trial court’s decision on a motion to suppress, we view the facts in the light most favorable to upholding the trial court’s ruling and consider only the evidence presented at the suppression hearing.” *State v. Teagle*, 217 Ariz. 17, ¶ 2, 170 P.3d 266, 269 (App. 2007). We will affirm the trial court’s ruling absent an abuse of discretion. *State v. Cruz*, 218 Ariz. 149, ¶ 47, 181 P.3d 196, 208 (2008).

¶9 After receiving complaints of trespassing and increased gang and narcotics activity at an apartment complex, police officers from the gang tactical unit were patrolling the complex at night when they saw Jones walking toward a stairway. Jones looked in the officers’ direction, “put his head down, put his hands in his pocket, and immediately turned and started going up the stairs” of one of the buildings. After an officer “put [his] spotlight” on Jones, the officers watched Jones walk up the stairs, pause, “remove[] his left hand from his pocket,” place it on the railing and open it, letting objects fall from his hand and over the railing. Jones then knocked on the door of an apartment. Although a woman inside the apartment looked out the window in Jones’s direction, she did not open the door. Two officers approached Jones as he walked back down the stairs and asked him if he lived in the apartment complex or was visiting someone there. A third officer went to the area where the

objects had fallen from Jones's hand. As one officer was conducting a pat-down search of Jones, the third officer reported he had found cocaine, and Jones was arrested.

¶10 Jones argues that evidence of the cocaine should have been suppressed (and, in turn, the charges against him dismissed) because police officers did not reasonably suspect him of criminal activity when the officer shined the spotlight on him.³ Under *Terry v. Ohio*, 392 U.S. 1, 21 (1968), a police officer may make a limited investigatory stop in the absence of probable cause only if the officer can “point to specific and articulable facts which, taken together with rational inferences from those facts,” amount to reasonable suspicion that the suspect is involved in criminal activity. But “[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.” *Id.* at 20 n.16; *see also Brendlin v. California*, ___ U.S. ___, ___, 127 S. Ct. 2400, 2405-06 (2007); *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Jones was not restrained by the officer's use of the spotlight. Rather, he had continued up the stairs to knock on an apartment door. He was not stopped until after the officers saw him drop something over the railing and he had come back down the staircase. At that point, given the totality of the circumstances, the officers had a reasonable suspicion he was involved in some criminal activity. Nor did the use of the spotlight constitute a search under the Fourth Amendment. *See United States v. Dunn*, 480 U.S. 294, 305 (1987)

³To the extent Jones also attempts to challenge the pat-down search the officers conducted, we need not address the argument because no drugs were found on Jones's person and nothing found as a result of the search was introduced in evidence at trial.

(“officers’ use of the beam of a flashlight, directed through the essentially open front of respondent’s barn, did not transform their observations into an unreasonable search); *see also Texas v. Brown*, 460 U.S. 730, 739-40 (1983). The court did not abuse its discretion in denying Jones’s motion to suppress.

Conclusion

¶11 Pursuant to our obligation under *Anders*, we have reviewed the record in its entirety. We are satisfied that it supports counsel’s recitation of the facts, as Jones concedes it does, and we have found no error requiring reversal. Jones’s conviction and sentence are therefore affirmed.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge